CORRECTED COPY

Office - Supreme Court, U.S.
FILED
JUL 27 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 286

KREBIOZEN RESEARCH FOUNDATION ET ALS,
PETITIONERS,

v.

BEACON PRESS, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS FOR SUFFOLK COUNTY

REGINALD HEBER SMITH,
60 State Street
Boston, Massachusetts
Attorney for the Petitioners.

JAMES D. ST. CLAIR,
JOHN F. COGAN, JR.
HALE AND DORR,
60 State St., Boston, Mass.
JOHN F. SEMBOWER
105 South LaSalle St., Chicago, Ill.
Of Counsel

Blanchard Printing Company, Boston, Mass. — Law Printers

TABLE OF CONSTITUTIONAL PROVISIONS CITED.

Page

United States Constitution, Amendment 1 3
United States Constitution, Amendment 14, Section 1 2,3,6

MISCELLANEOUS.

Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 H. L. R. 640, 652 7

Supreme Court of the United States

OCTOBER TERM, 1956.

No.

KREBIOZEN RESEARCH FOUNDATION ET ALS,
PETITIONERS,

v.

BEACON PRESS, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS FOR SUFFOLK COUNTY

Krebiozen Research Foundation, Andrew C. Ivy, Stevan Durovic and Marko Durovic pray that a Writ of Certiorari issue to review the rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in the above case May 3, 1956, affirming the Interlocutory and Final Decree of the Superior Court of the Commonwealth of Massachusetts for Suffolk County.

Opinion Below

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, set forth in Appendix B hereto, is reported at 334 Mass. (1956 Mass. A.S. 513) and at 134 N.E.2d 1.

TABLE OF CONTENTS.

Subject Index.

	Page
Opinion Below	1
Jurisdiction	2
How Federal Question Is Presented	2
Question Presented	2
Constitutional Provisions Involved	3
Statement	3
Reasons for Granting the Writ	5
1.	5
2.	7
3.	8
4.	9
Conclusion	10
Appendix A	11
Appendix B	12

Table of Cases Cited.

Beauharnais v. *Illinois*, 343 U.S. 250 (1952)	7
Black & Yates v. *Mahogany Assn.*, 129 F.2d 227, 231 (3d Cir.) (1941)	7, 8
Joseph Burstyn Inc. v. *Wilson*, 343 U.S. 495, 503	6
Cantwell v. *Connecticut*, 310 U.S. 296 (1940)	7
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942)	7
Grosjean v. *American Press Co. Inc.*, 297 U.S. 233, 245	6
Lovell v. *Griffin*, 303 U.S. 444, 451	6
Near v. *Minnesota*, 283 U.S. 697, 716	5, 6, 7
Superior Films, Inc. v. *Department of Education of Ohio*, 346 U.S. 587, 588	6

Jurisdiction

The rescript of the Supreme Judicial Court was entered on May 3, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) since the validity of the Petitioners' rights and privileges guaranteed under the 14th Amendment to the United States Constitution is drawn into question.

How Federal Question Is Presented

In a suit by the Petitioners to enjoin a libelous and defamatory publication damaging personal and professional reputations of the Petitioners and their property rights in a drug, the Supreme Judicial Court of Massachusetts upheld the Superior Court in sustaining a demurrer to the bill of complaint on the ground that the court had no jurisdiction to enjoin the publication because to do so would violate freedom of speech protected against encroachment by the states under the Fourteenth Amendment, thereby depriving the Petitioners of their property without due process of law.

Question Presented

Whether the public interest in free speech as protected by the 14th Amendment requires the dismissal of a bill in equity to enjoin the publication of a book alleged to contain defamatory statements which would tend to injure and destroy the professional reputation and good name of the Petitioners and the commercial value of a drug, on the ground that a court of equity has no jurisdiction because of this constitutional Amendment protecting freedom of speech.

Constitutional Provisions Involved

The constitutional provisions involved are Amendment 1 and Amendment 14, Section 1, of the United States Constitution. They are set forth in Appendix A of this petition.

Statement

The Petitioners' bill in equity was brought in the Superior Court of the Commonwealth of Massachusetts for Suffolk County to enjoin the Respondent from publishing and distributing a book entitled "Krebiozen—The Great Cancer Mystery" by one George D. Stoddard which book the Petitioners allege to contain false, fraudulent, wrongful, malicious, and erroneous statements which would tend to injure and destroy the professional reputation and good name of the Petitioners and the commercial value of a drug called *Krebiozen.* (R. p. 2) Since this case was heard on demurrer, the facts and inferences drawn from the Petitioners' Bill must be taken as true. These facts as pleaded would establish that the Petitioner, Dr. Stevan Durovic, a medical doctor, had developed a drug called *Krebiozen* which was being investigated by the Petitioners, Dr. Stevan Durovic and Dr. Andrew C. Ivy, for its therapeutic merits in the treatment of cancer. (R. p. 2) Dr. Ivy is a medical doctor and a physiologist, and Head of the Department of Clinical Science at the University of Illinois. At the time Dr. Ivy began his investigation of *Krebiozen,* he was Executive Director of the National Advisory Cancer Council of the U. S. Public Health Service and a member of the Board of Directors of the American Cancer Society. Dr. Ivy had also been selected and proposed by the Board of Trustees of the American Medical Association to the Secretary of War and Secretary of State to serve as an expert advisor and witness at the Nurenberg Medical Trials on

the subject of Medical Ethics and Clinical Investigation. (Exhibit "A" p. 2)

The drug *Krebiozen* was in no way held out by the Petitioners to be a cure for cancer. In fact, as the Petitioners alleged, the drug's therapeutic merits have yet to be conclusively established in the United States. (R. p. 2) The drug is not for public sale in the United States. It is not sent directly to patients but is supplied only to physicians after they have submitted certain records and statements required by the rules and regulations of the Federal Food and Drug Administration. (R. p. 2) The physicians using the drug are supplied with forms on which they report their clinical findings and observations following treatment with the drug. (R. p. 3)

While the Petitioners were still engaged in experimentation and investigation of the drug, and before they had conclusively determined the therapeutic merits of the drug, the Respondent published and distributed in galley proof form copies of said book. The statements made in this book attacked the professional reputations and competence of the Petitioners as medical researchers and the value, efficiency and even the very existence of the drug *Krebiozen* (R. pp. 3-4), which statements the Petitioners claimed were false, fraudulent, wrongful, malicious and erroneous. (R. p. 2)

Upon the Petitioners' application, the Superior Court issued a temporary restraining order enjoining the Respondent from publishing or distributing said book. This restraining order was continued by stipulation of the parties until further order of the Court. (R. p. 11) The Court allowed the Defendant's motion for leave to file a demurrer reserving its right to answer. (R. p. 12) The Respondent then demurred to the Petitioners' Bill on the ground that the granting of an injunction would violate the Constitutions of the United States and the Commonwealth of Mas-

sachusetts and that irrespective of the United States and Massachusetts Constitutional provisions, the Court had no jurisdiction or power to grant such an injunction. (R. p. 12) [1] The Superior Court sustained the Respondent's demurrer and entered a final decree dismissing the Petitioners' Bill and dissolving the temporary restraining order. The Petitioners appealed to the Supreme Judicial Court of Massachusetts which affirmed the decrees of the Superior Court stating that this case was substantially controlled by *Near* v. *Minnesota,* 283 U.S. 697. (Appendix B, p. 23) While this appeal was pending before the Supreme Judicial Court the Respondent further published and distributed this book in bound volume form, which is in substantially the same form and tenor as the galley proof form, and the Respondent is still publishing and distributing for sale copies of said book which the Petitioners maintain represent a continuing and unjustified attack upon them.

The Petitioners have requested that a Writ of Certiorari be directed to the Superior Court of the Commonwealth of Massachusetts for Suffolk County, which is the court having custody of the records in the above case and the court to which the Supreme Judicial Court of Massachusetts directed its rescript ordering the entry of its affirmation of the Superior Court's final decree.

Reasons for Granting the Writ

1. The Supreme Judicial Court of Massachusetts in deciding that the Superior Court had no jurisdiction to enjoin allegedly libelous publications to protect private rights stated that the instant case was "substantially controlled"

[1] In the course of a hearing on the demurrer, the Respondent waived grounds 3, 4 and 5 asserted in its demurrer (R. p. 13).

by *Near* v. *Minnesota,* 283 U.S. 697 (Appendix B, p. 23). Yet this matter was the very one which the Court in the *Near* case specifically excluded in its opinion:

> "Nor are we now concerned with questions as to the extent of authority to prevent publication in order to protect private rights according to principles governing the exercise of jurisdictions of courts of equity"
>
> *Near* v. *Minnesota,* 283 U.S. 697, 716.

In the instant case the Supreme Judicial Court decided that a court of equity had jurisdiction to issue an injunction to protect personal and property rights from irreparable harm by defamation but that the constitutional protection of free speech and the public interest in free discussion in the instant case eliminated this jurisdiction.

While the *Near* case and later cases emphasized the history of the struggle against governmental censorship, these leading cases have all involved the problem of a governmental body or agency attempting to establish a system of censorship. *Grosjean* v. *American Press Co., Inc.,* 297 U.S. 233, 245. *Lovell* v. *Griffin,* 303 U.S. 444, 451. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 503. *Superior Films, Inc.* v. *Department of Education of Ohio,* 346 U.S. 587, 588. Certainly to allow an executive governmental agency such power would be dangerous precedent. However, the case at bar is not such a situation. Here private rights are involved, both personal and proprietary, which are also guaranteed constitutional protection under the due process clause of the 14th Amendment. The Massachusetts Court in the case at bar has assumed that the public interest in free speech must necessarily be paramount to the private rights of individuals. Yet this position is fundamentally antagonistic to our judicial and con-

stitutional system which is designed to protect the rights of the individual and the minority rather than to infringe upon them without showing that the benefit to the community outweighs the detriment to the individual.

There is good reason to understand why the Court in the *Near* case excluded the problem that is presented in the case at bar. The Supreme Judicial Court in deciding as it did in the instant case that the constitutional protection of free speech prevents the petitioners from enjoining libelous and defamatory statements is reading into the constitutional protection of free speech a concept that there is a guarantee of the liberty to intimidate by speech and writings. See Pound, *Equitable Relief Against Defamation and Injuries to Personality,* 29 H.L.R. 640, 652. This is a substantially important and different problem than is involved in cases limiting the power of governmental bodies or agencies from exercising censorship.

2. Also, the decision of the Supreme Judicial Court would appear in conflict with this Court's recent decision in *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952) which stated that libelous utterances were not within the area of constitutionally protected speech. This decision gave added support to the statements of this Court in the earlier cases of *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) and *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). In the latter case the Court clearly indicated that the *prevention* and punishment of classes of speech which included libel "had never been thought to raise any constitutional objections" (p. 571).

In addition the Petitioners have alleged a trade libel. (R. p. 2). In *Black & Yates* v. *Mahogany Assn.,* 129 F.2d 227, 231 (3d Cir.) (1941) where this Court denied certiorari, the Circuit Court held that a court in equity had power to restrain a trade libel. There the Circuit Court stated:

> "Freedom of discussion of public issues does not demand lack of 'previous restraint' for injury to private goods" p. 231.

Certainly an individual's private and professional reputation deserves at least the same protection as a trade name.

3. It is clear that this case could only have been decided on constitutional grounds. The Supreme Judicial Court concluded its opinion by stating:

> "The constitutional protections are clear and controlling, but were they absent, the weight, in the balance, of the public interest in the discussion of cancer cures would be sufficient basis here for the denial of an injunction." (Appendix B p. 26.)

It is submitted that were the constitutional provisions absent in the case at bar, the court could not have decided this case on any theory of weighing opposing interests since the only issue before the Supreme Judicial Court on demurrer was whether the trial court properly sustained the Respondent's demurrer on the ground that it had no jurisdiction.

In its opinion the Court purports to have weighed the evidence as to whether the Petitioners' property rights or the public interest in this matter is paramount without ever holding any hearing on the merits of these conflicting interests. (See Appendix B pp. 20-22.) The language of the opinion tends to create the impression that the Court was reviewing an exercise of discretion on the part of the trial court. But the problem of discretion was not present. It would be an entirely different matter if the trial court had weighed the evidence and then refused to enjoin the defamatory writings on the grounds that the public interest in the matter outweighed the considerations for granting

an injunction. In such a case the Supreme Judicial Court would then be in a position to examine the exercise of this discretion.

It would appear then that the Supreme Judicial Court assumes that always and in all cases where there is a public issue involved, the constitutional protections of free speech eliminate the jurisdiction of the trial court even to hear the merits of the case so as to decide whether the protection of private rights or the public interest in free discussion is more important. The Petitioners submit that such a result deprives them of any hearing on matters affecting their personal and private rights so as to constitute a deprivation of property without due process of law.

4. In summary, it is clear that the Court believed the "constitutional protections are clear and controlling" as a basis for its position that the trial court had no jurisdiction to hear this case. (Appendix B p. 26.) The Court attempted to support its decision on the ground that the public interests outweighed the private interests in the case at bar, without any hearing on the merits of these respective interests, a matter which was never before the Court on demurrer.

Clearly the question involved in this case as to whether the constitutional protections of free speech eliminate the jurisdiction of a court of equity to protect personal and property rights from defamation is one of constitutional importance. This question has never been answered by this Court. In fact, the Supreme Judicial Court of Massachusetts, the highest court of the Supreme Court of the United States, the area of constitutional law, the Petitioners submit that these questions are of importance not only because they involve constitutional importance in the field of libel and slander, but because there are involved

equal and perhaps greater issues as to whether the rights of the individual should be infringed and ignored without any hearing on the merits in the name of a putative and undemonstrated welfare of the majority. Finally the Petitioners wish to note that should the decision of the Supreme Judicial Court be reversed, it would mean only that the trial court could issue an injunction, not that it must.

Conclusion

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

Reginald Heber Smith,
Attorney for the Petitioners.

James D. St. Clair,
John F. Cogan, Jr.
Hale and Dorr,
60 State St., Boston, Mass.
John F. Sembower
105 South LaSalle St., Chicago, Ill.
Of Counsel

Appendix A

UNITED STATES CONSTITUTION

Amendment I

Personal Freedom

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV

Citizens and Their Rights; Apportionment of Representatives; Loss of Political Privileges; Public Debt

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B

OPINION OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

WHITTEMORE, J. The plaintiffs seek to enjoin publication and distribution by the defendant of a book allegedly entitled either " 'Krebiozen': The Great Cancer Mystery," or "The Great Cancer Mystery," by George D. Stoddard. This is the plaintiffs' appeal from the interlocutory decree sustaining the defendant's demurrer and from the final decree dismissing the bill of complaint. There was no error.

The plaintiff Krebiozen Research Foundation is identified in the bill as an Illinois nonprofit corporation. The plaintiff Andrew C. Ivy is described as a medical doctor and physiologist, head of the department of clinical science at the University of Illinois, who has been engaged "for over five years in research and clinical investigation of said drug in his capacity as scientific advisor of said Krebiozen Research Foundation." The plaintiffs Marko Durovic and Stevan Durovic are stated to be the proprietors of Duga Laboratories which owns the manufacturing rights to produce Krebiozen. The bill states, "Dr. Durovic is a medical doctor who developed said drug, Krebiozen. He has worked with Dr. Ivy in research and investigation to determine the efficacy of said drug in the treatment of cancer." Included quotations from the subject book indicate that the reference is to Stevan Durovic.

The defendant is described as a Massachusetts business corporation, the publisher of the subject book, which publishes and distributes books widely for sale throughout the United States. It is alleged that galley proofs of the book have already been published and distributed and that the book is about to be put on general public sale.

The bill states that "Being a drug in the experimental

stage, Krebiozen's therapeutic merits have yet to be conclusively established in the United States."

It is alleged also that "Dr. Ivy and Dr. Durovic have performed a thorough, painstaking, basic research on the drug involving the use of many animals and hundreds of case reports supplied by physicians of cancer patients throughout the United States. (See Exhibit 'A.')" The reference is to a thirty page booklet attached to the bill of complaint entitled "Report on Krebiozen. An agent for the treatment of cancer. Its clinical pharmacodynamic and chemical properties 1951-1954. By the Krebiozen Research Foundation." Twenty-three pages of print in the exhibit are summaries of what one hundred doctors are stated to have said about approximately one hundred twenty-five patients, each doctor and patient being identified by initials.

The bill recites that the plaintiffs believe and allege the book "to contain false, fraudulent, wrongful, malicious and erroneous statements which tend to injure and destroy the good name and professional reputation of the . . . [plaintiffs] and the commercial value of the drug, Krebiozen." It also alleges that certain specified statements [1] and other

---

[1] The quotations from the book are as follows:

"The 'Krebiozen' program—given a few more months without inspection from outside agencies or official resistance, sustained by testimonials from hundreds of obscure patients and a few prominent ones, all dying of cancer—. . . ."

"There must have been considerable expense also in gathering testimonials from cancer patients."

"Dr. Ivy was depending now upon the subjective testimonials that came to him from many quarters—not upon the objective tests demanded by his profession."

"In the case of 'Krebiozen,' secrecy was the watchword of its advocates and subjective testimonials their chief evidence."

"He, (Dr. Durovic) originated, and planned to market, the secret 'Krebiozen' remedy."

"In the case of 'Krebiozen,' Dr. Ivy and his associates, in full charge of the research for three years, did not undertake any controlled studies of the effect of cancer upon animals or patients."

statements and the whole tenor of the book "expressly or impliedly state that the . . . [plaintiffs] are trying to promote a secret remedy without adequate scientific research and that . . . [the plaintiffs] know their remedy to be worthless . . . , [and] are designed and will have the effect of impeding further clinical investigation of said drug and its commercial marketability in foreign countries where its sale is licensed." The bill specifies that the statements quoted in the bill and other statements and the whole tenor of the book libel Dr. Durovic and Dr. Ivy in charging them with having acted unethically and violated professional standards, with using testimonials from patients contrary to professional standards, with the promotion of secret remedies for personal profits, with shoddy and careless research, and with uncritical indorsement of remedies. It also alleges that the publication of the book will cause irreparable damage to the professional reputations of the plaintiffs as doctors and scientists, and will subject them to professional suspicion, contempt and "ostracization" and to public contempt and ridicule, and that the trade name of the drug will be irreparably injured.

The specifications of the bill indicate that in some respects the statements in the book do not warrant the general allegations made about it. For example, the bill makes the point that the author of the book knows that the suggestions of nonprofessional reliance on paid testimonials from patients are false. But the relevant quoted words are, "There must have been considerable expense also in gathering testimonials from cancer patients" and ". . . subjective tes-

"It will be clear that I am suspicious of the competence and integrity of Dr. Durovic and his brother Marco."

"In short the whole procedure is such as to raise grave doubts not only as to the competence of Dr. Durovic and the efficiency of the drug but as to the very existence of the latter."

"It is my considered opinion that, except possibly as a common, harmless, inexpensive ingredient, *Krebiozen does not exist.*"

timonials [were] their chief evidence." These words do not charge that any payments were made to patients. There would presumably be expense in getting the medicine out to doctors for testing and getting back and collating reports, and for aught that appears that is the expense referred to. The one hundred twenty-five or so reports in exhibit A show that the plaintiffs were making use of favorable reports from doctors about patients, and were presenting this part of the available data much in the way testimonial material direct from patients is often presented by those who sell medicines with the use of testimonials. The contents of these reports, to some extent at least, reflect subjective aspects of the reported illnesses.

And while it is questionable how far the defendant's motivation will be of controlling significance in a case of a writing in a field of public interest (see *Near* v. *Minnesota*, 283 U.S. 697, and footnote, page 523, *post*), it is to be noted that the bill here does not make out a case of active malice in the defendant—of a purpose to injure the plaintiffs or their business rather than an intent to publish a book about a controversial subject.

The summary allegation that the false statements are "malicious" is usual in a libel suit. The word is one of art in such pleading and does not carry the import of "actual malice" (*Commonwealth* v. *Bonner*, 9 Met. 410; *Kenney* v. *McLaughlin*, 5 Gray, 3, 5; *Goodwin* v. *Daniels*, 7 Allen, 61, 63; *Conner* v. *Standard Publishing Co.*, 183 Mass. 474, 480; and see G. L. [Ter. Ed.] c. 231, § 92). The word "fraudulent" without specification does not advance the pleader (*Garst* v. *Hall & Lyon Co.*, 179 Mass. 588; *Nye* v. *Storer*, 168 Mass. 53; *Second Society of Universalists in Boston* v. *Royal Ins. Co. Ltd.*, 221 Mass. 518, 523; *Cosmopolitan Trust Co.* v. *S. L. Agoos Tanning Co.*, 245 Mass. 69, 73). These words are used in the bill in respect of the statements in the book and not as to the defendant's actions. That the

defendant had refused in spite of the plaintiffs' efforts to let the book be seen (efforts made, as asserted, "to offer proof as to the inaccuracy of certain statements . . . [allegedly] libellous") is consistent with sound business procedure. The quotations from the book suggest the probability that the author is moved by strong feeling, but whatever their implications as to his aim they do not bear with any critical force on the motives of the publishing defendant.

We judge the bill here as one the full import of which is that the defendant publishing company is publishing a book in a controversial field [1] charged with the public interest

---

[1] That there is a public controversy in print about Krebiozen is disclosed in the pamphlet exhibit A attached to the bill. We quote from page 7.

"INVESTIGATION OF CONTROVERSY ON KREBIOZEN AND CONCLUSION OF LEGISLATIVE COMMISSION OF ILLINOIS GENERAL ASSEMBLY

While the clinical studies of Krebiozen were still in progress and before any report of the findings was published, certain individuals publicly expressed much very unfortunate criticism which has been premature, inaccurate and misleading. This unscientific and unusual criticism of an experimental work before it had been completed and its results published gave rise to the appointment by the 68th Illinois General Assembly of a Joint Committee of Fourteen Legislators to investigate the Krebiozen Controversy. The Committee later became a Legislative Commission to continue the work after the adjournment of the Illinois Legislature, on July 1, 1953.

On March 25, 1954, the Commission issued an interim Report in which it was unanimously concluded:

a) That further study and research on Krebiozen should be continued.

b) That Dr. Stevan Durovic and Mr. Marko Durovic on the basis of the record are men of good character.

c) That the personal integrity of Dr. A. C. Ivy is above reproach.

d) That 'his (Dr. Ivy's) conduct of Krebiozen research was in conformity with the highest ethical and humanitarian plane, and that his testimony before the Commission reaffirmed in our minds his reputation as a great scientist.'

e) That as to Dr. George Stoddard, who resigned as the President of the University of Illinois on July 25, 1953, at the height of the controversy over Krebiozen, on a vote of no-con-

which is false in whole tenor and in certain details and known in certain respects by the author to be false and which will damage professional reputation and business property.

EQUITY HAS JURISDICTION TO ISSUE AN INJUNCTION.

In *Menard* v. *Houle,* 298 Mass. 546, 547-548 (where the defendant was with words and acts letting the people of Springfield know he thought the plaintiff sold automobiles which were lemons), we summarily reviewed the decisions of this court in respect of the right to enjoin defamation. In that decision we said, "The defendant relies upon *Boston Diatite Co.* v. *Florence Manuf. Co.,* 114 Mass. 69, wherein it was held that equity jurisdiction does not extend to cases of libel or slander or of false representations as to the character or quality of the plaintiff's property or as to his title thereto which involve no breach of trust or of contract. See also . . . [cases cited]. But later cases have held that equity will take jurisdiction where there is a continuing

---

fidence by University Trustees, the Commission concluded that 'untactful handling of his public statements added to the controversy.' "

And the reports from doctors expressly referred to in the bill are preceded by a paragraph reading, "A complete description of these patients as well as of all others in the files of the Krebiozen Research Foundation, together with laboratory and X-ray findings will be given in Dr. Ivy's forthcoming 'Observations on Krebiozen . . .' an extensive study of 550 Krebiozen-treated cases."

Also on page 27 of exhibit A a doctor's report on a patient concludes, "In spite of the fact that recent periodicals have remarked that Krebiozen is of no benefit, I feel that this patient has made sufficient improvement to continue therapy with it."

Were we to assume that all these parts of the exhibit were incorporated in the bill as allegations of fact they would extend to a degree the implications of the bill and suggest that the author's views and statements relate in part at least to past controversy and a desire for vindication of a position taken which could conceivably have had a part in his resignation. But a showing in the bill of such motivation of the author would not materially change the case in its controlling aspects.

course of unjustified and wrongful attack upon the plaintiff motivated by actual malice, and causing damage to property rights as distinguished from 'injury to the personality affecting feelings, sensibility and honor' (*Choate* v. *Logan*, 240 Mass. 131, 135), even though false statements and false announcements are the means or are among the means employed, and that in such cases there is no adequate remedy at law. . . . [Cases cited.] This case [*Menard* v. *Houle*] falls within the principle of the cases last cited." And see *Kenyon* v. *Chicopee*, 320 Mass. 528, 533.

In *Lawrence Trust Co.* v. *Sun-American Publishing Co.*, 245 Mass. 262, it was held on demurrer that the plaintiff made out a case for equitable relief on allegations of many and repeated editorials containing false and misleading statements made with sole intent to harm the bank and its property by persuading depositors to discontinue their business with the complainant bank.

The plaintiffs urge that we should make express the implications of the more recent cases and now rule that, even absent the special circumstances emphasized in those cases, an injunction may issue to protect not only rights of property but also rights of personality from irreparable harm by defamation.

The plaintiffs in support of their argument refer to the statement in *Menard* v. *Houle*, 298 Mass. 546, 548, that "There is evidence of a process of evolution which may be still in progress," to the strong attacks by commentators on the rule of the *Boston Diatite Co.* case (see Pound, Equitable Relief Against Defamation & Injuries to Personality, 29 Harv. L. Rev. 640, 658), to the substantial erosion of the principle asserted in *Boston Diatite* by our own holdings (these are cited in *Menard* v. *Houle*) and to some of the language in those decisions (for example, "[It] arose before this court had complete equity jurisdiction," *Aronson* v. *Orlov*, 228 Mass. 1, 11), to the asserted present

willingness of English courts to grant injunctions "against a libel if it is clearly shown to be one, exactly as in case of any other tort" (Pound, *ibid.*, 665), and to the asserted trend of Federal decisions (citing *Black & Yates, Inc.* v. *Mahogany Association Inc.*, 129 Fed. [2d] 227 [C. C. A. 3], 1941).

In support of the desired extension to include personal rights in the protection to be given by equity from injury by defamation the plaintiffs appropriately refer to our holding in *Kenyon* v. *Chicopee*, 320 Mass. 528, 534, where in the course of reversing decrees sustaining demurrers to a bill to enjoin the enforcement of an ordinance which forbade public distribution of handbills and the like, we said, "We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction." And see *Mark* v. *Kahn*, 333 Mass. ——, ——,[1] applying this rule.

The opinion in *Boston Diatite Co.* v. *Florence Manuf. Co.*, 114 Mass. 69, gave no reason for the rule there stated. Critical analysis (Pound, *ibid.*, 658 et seq.) has shown how little real support was given by the cited English cases. The more recent holdings of this court and statements in them, culminating in the broad statement of principle in *Kenyon* v. *Chicopee*, establish, contrary to the rule earlier stated, that equity jurisdiction does extend to cases of libel and slander. And see Restatement: Torts, § 937, comment a. Whether it is to be exercised, however, depends as in every case where the jurisdiction is invoked to protect interests of property or personality, or both, upon all the relevant circumstances. It is apparent that the constitutional protection of free speech and public interest in the discussion of many issues greatly limit the area in which

[1] Mass. Adv. Sh. (1956) 135, 138.

the power to give injunctive relief may or should be exercised in defamation cases. Chafee, Government & Mass Communications, 88-90. 69 Harv. L. Rev. 875, 944-945. Leflar, Legal Remedies for Defamation, 6 Ark. L. Rev. 423, 434-436.[1] *Ryan* v. *Warrensburg,* 342 Mo. 761, 771-772. Compare *Kwass* v. *Kersey,* —— W. Va. ——, ——;[2] *Montgomery Ward & Co.* v. *United Retail, Wholesale & Department Store Employees of America, C. I. O.,* 400 Ill. 38, 43-46.

We need not pause for a more precise definition than our cases now afford of the line dividing the special situations in which equity should exercise its jurisdiction to restrain the use of words from those in which public policy or constitutional provisions stay its hand. In this case it is clear that the public interest in the discussion of the subject of cancer and the constitutional protection of a free press are paramount.

An Injunction Was Properly Denied Because of Constitutional Rights and the Public Interest.

The plaintiffs urge that there is no protection for dissemination of what is admittedly false and they stress the rule that, to test the bill, the demurrer in a sense admits

---

[1] The statement by Leflar that "When in rare cases courts today [1952] do enjoin publications they always insist that the thing actually restrained is not the libel or slander as such but the extrinsic property tort which happens to include some improper use of words," may be an overstatement as applied to a possible case of alleged libel where no property interest is shown but where also there appears no aspect of public interest. His statement, however, that "today equity courts are if anything less ready to enjoin defamations than they were twenty or thirty years ago when Pound and Chafee felt that this procedure might quickly afford the relief that clearly was needed from the inadequacies of the law's remedy for the tort" (page 435), may reflect increased recognition of the effect of the free speech considerations in all but the exceptional case.

[2] 81 S. E. (2d) 237, 247.

its allegations.[3] The plaintiffs ask, "Is an attack on efficacy and existence of a drug, the therapeutic merits of which are still under investigation . . . of such overriding public interest that the . . . [plaintiffs] should be powerless to stop defamatory statements concerning themselves and the drug?" We think the answer is "Yes."

The establishment of the truth about Krebiozen as soon as possible is critically important to the public. If it is a cure it will be one of the great discoveries of modern times; if it is of value in some cases only the limitations are important; if it is of no value lives may be saved and suffering avoided by the establishment of the fact. If there are aspects of the present investigation of the drug which do not meet accepted standards, knowledge of that fact will assist experts who must appraise the available data and will aid cancer patients and their medical advisors in determining whether to concern themselves with the drug in the present period. It is axiomatic in our society that full information and free discussion are important in the search for wise decisions and best courses of action. In a particular case, to be sure, new discovery may be impeded by a false and unjust attack. Discoveries by persistent innovators sometimes confound the skeptics who believe they know all about presently accepted principles and what, because of those principles, can and cannot be done. We grant that it could conceivably be here, as claimed, that this attack which the demurrer admits for present purposes to be false and defamatory will impede progress in the testing of Krebiozen. But basing a rule on that possibility would end or at least effectively emasculate discussion in

[3] While to test whether the demurrer will lie it is necessary to assume that the allegations of the bill may be proved true, the fact of demurring is of course not an admission by the defendant that the defendant cannot prove the truth of the statements complained of or that he will not undertake to do so if the case is tried.

the very controversial fields where it is most important. And it is hard to believe that the publication of a critical book, even though it contains false statements and is of false tenor overall, will prevent the full testing of any substance which in fact shows to the profession any promise of curing or alleviating cancer.

Mr. Chaffee has answered the plaintiffs' question (Government & Mass Communications, pages 91-92): "One may ask, 'What is the value of letting people read false statements?' That is not quite the whole story. In the first place, the matter in question may not be wholly false. Along with the lies and distortions may go a good deal of truth, which the public ought to read and will never read if the publication be prohibited. An injunction cannot very well discriminate in such cases; it must root up the wheat with the tares. . . . Furthermore, we cannot safely assume that the statements are really false. All we know is that the plaintiff and the judge call them false. If the judge could suppress the whole publication because of his opinion about a few items, he would be a sort of censor. One man's judgment is not to be trusted to determine what people can read. . . . So our law thinks it better to let the defamed plaintiff take his damages for what they are worth than to intrust a single judge (or even a jury) with the power to put a sharp check on the spread of possible truth."

In *Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230, 249-250, we said that "the 'liberty of the press' which, under art. 16 of the Declaration of Rights, 'ought not . . . to be restrained in this commonwealth' . . . [is a freedom] comparable to the rights of 'freedom of speech' and 'of the press' . . . declared in the First Amendment to the Constitution of the United States, and held to be part of the 'liberty' protected by the Fourteenth Amendment against abridgment by a State without due process of law. . . . '. . . The press in its historic connotation comprehends

every sort of publication which affords a vehicle of information and opinion.' Hughes, C.J., in *Lovell* v. *Griffin*, 303 U. S. 444, 452. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Ibid., quoting from *Ex parte Jackson*, 96 U.S. 727, 733."

These statements are applicable here. It is of course important historically to understand that liberty of the press in its eighteenth century connotation meant primarily if not exclusively liberty to publish without previous license. But it is now well established, as stated in the *Bowe* case (page 250), that "freedom from the need of previous license by no means satisfies the constitutional guaranty. Authors and publishers are entitled to a high degree of protection from legal accountability for what they write and publish. *Thornhill* v. *Alabama*, 310 U. S. 88, 101, 102."

This case under the Constitution of the United States is substantially controlled by *Near* v. *Minnesota*, 283 U.S. 697. In that case a Minnesota statute provided that one who engaged in the business of regularly and customarily producing and publishing a malicious, scandalous and defamatory newspaper, magazine or other periodical is guilty of a nuisance and may be enjoined. The State sought an injunction under the statute to prevent Near from publishing a newspaper in which scandalous and defamatory statements were made about public officials. The statute was held unconstitutional. It is true, as the plaintiffs point out, that that case is stronger in that the statute there if applied would suppress future editions of the newspaper, but the grounds stated by the court are applicable to what would be done by injunction here. Much is made in that case of the importance of free discussion of office holders and of political matters. But we think that the discussion of a possible or alleged cure of one of the great scourges of mankind is substantially of the same rank as a matter for

public discussion. The words of Chief Justice Hughes (page 721) are apt which show that allowing prior restraint, provided only a judge is convinced of the falsity of the proposed publication, amounts to unconstitutional censorship.

While in that case the complainant was the State and here the complainants are those whose private property and personal rights are affected, the Minnesota officials who were libelled had of course private rights at stake, and the fact that a public interest against the publication of a scandalous newspaper could be shown was an argument in the *Near* case against the decision of the court. It was found in the *Near* case (page 706) that "the editions in quest[illegible]efly devoted to malicious, scandalous and defa[illegible]cles.' "[1]

Other [illegible]ions of the United States Supreme Court state the compelling arguments against prior restraint of publication, which in reality must mean *restraint* of publication. *Patterson* v. *Colorado*, 205 U. S. 454, 462. *Grosjean* v. *American Press Co. Inc.*, 297 U. S. 233, 249-250. *Lovell* v. *Griffin*, 303 U. S. 444, 451-452. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503. *Superior Films, Inc.* v. *Department of Education of Ohio*, 346 U.S. 587, 588.

The plaintiffs rely upon the statement in *Beauharnais* v. *Illinois*, 343 U. S. 250, 266, that libellous utterances are not within the area of constitutionally protected free speech. The statement must be read in its context. The appellant in that case had been convicted for distributing anti-negro pamphlets under a statute making unlawful any publica-

[1] The constitutional point was not made in *Lawrence Trust Co.* v. *Sun-American Publishing Co.*, 245 Mass. 262 (1923), where intentional disparagement of business was stressed. But the *Near* case shows that motivation may be unimportant if the discussion is in a field charged with the public interest. The soundness of banks may be such a field. The opinion in *Baldwin* v. *Commissioner of Banks*, 283 Mass. 423, 424, shows that in 1931 the Lawrence Trust Company was insolvent and its liquidation had begun.

tion of described kinds which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens . . . which . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." The pamphlets included the statement, "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will." The statute was upheld as a form of criminal libel law. The court noted that every American jurisdiction punishes criminal libel without raising constitutional problems and held that group libels have the same status in this respect as individual libels and that as construed and applied the statute did not violate the Fourteenth Amendment. Even so there were four dissenting opinions in some of which are strong statements of the proposition that constitutional rights of free speech had been invaded. Perhaps in the last analysis how a given case is decided will depend upon the principal aspect of what the defendant has done and the nature of the public interest in the particular matter to which the subject words relate. If so, it may be noted in respect of the words quoted from the *Beauharnais* pamphlet that "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . ." (*Cantwell* v. *Connecticut,* 310 U. S. 296, 309-310) and that, in that case, there was a public interest, shown by the statute, against discussion of race relations in an inflammatory way. Here the great public interest is in the untrammelled discussion of cancer cures. In any event the *Beauharnais* case does not suggest that denial of an injunction in a case anything like this one is unnecessary for the protection of free speech. This case is not within the recognized exceptions to the application of the constitu-

tional rule. There are no words that have the effect of force as "verbal acts" (*Schenck* v. *United States*, 249 U. S. 47, 52; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439). There is no question of protecting the lewd, obscene or the profane or the merely libellous (see *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *Near* v. *Minnesota*, 283 U. S. 697, 716).

In Restatement: Torts, § 942 (pages 719-720), the authors say, "In cases of torts perpetrated by means of spoken or written words, the public interest in the freedom of speech frequently comes into conflict with the public interest in the prevention of tortious harms. Adjustments of this conflict must be made as best they can, in the light of the circumstances of each case, and in the light of the basic policies underlying each public interest. Sometimes the public interest in the freedom of speech prevails. For example, the public's concern with matters affecting health justifies denial of injunctive restraint of a newspaper's expose of the supposed qualities of a patent medicine." See *Willis* v. *O'Connell*, 231 Fed. 1004.

"Where an important public interest would be prejudiced, the reasons for denying an injunction may be compelling." *Godard* v. *Babson-Dow Manuf. Co.*, 313 Mass. 280, 288. *Harrisonville* v. *W. S. Dickey Clay Manuf. Co.*, 289 U. S. 334, 338 (citing *Near* v. *Minnesota*, 283 U. S. 697, 719).

The constitutional protections are clear and controlling, but were they absent, the weight, in the balance, of the public interest in the discussion of cancer cures would be sufficient basis here for the denial of an injunction.

Interlocutory decree affirmed.

Final decree affirmed with costs of the appeal.

TABLE OF CONTENTS

Subject Index

	Page
Constitutional Provisions Involved	1
Statement of the Case	1
Reasons for Denying the Writ	4
1.	4
2.	6
3.	9
4.	10
Conclusion	12
Appendix A	13

Table of Cases Cited

Near v. *Minnesota*, 283 U.S. 697	8, 9, 11

Table of Constitutional Provisions Cited

United States Constitution, Amendment 1	1, 13
United States Constitution, Amendment 14, Section 1	1, 4, 6, 13
Constitution of The Commonwealth of Massachusetts, Article XVI	1, 13